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Videotape As A Tool In The Florida Legal Process

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Abstract

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KEYWORDS: videotape, tool, legal

Videotape As A Tool In The Florida Legal Process

Florida is one of the pioneer states using videotape as evidence in the courtroom.¹ Commenting that "[t]he rule governing admissibility into evidence of photographs applies with equal force to the admission of motion pictures and video tapes,"² the Florida Supreme Court gave the Florida jurisprudential system a new tool to use in its search for justice.³ In the intervening years since videotape's introduction into the courtroom, there has been more conjecture than actual evidence regarding the nature of that tool and its place in the legal system.

Videotape has been used to overcome such diverse problems as unavailable witnesses, preservation of reliable testimony for use at trials, demonstrations for discovery and trial, and as a means of demonstrating the mental state of a defendant.⁴

Judge McCrystal of Erie County, Ohio, long an advocate of using videotape to present the entire trial testimony to the jury in certain types of litigation,⁵ proposes the use of videotape to record wills, contracts, police bookings, criminal arraignments, pleas, sentencing, proba-

1. *Paramore v. Florida*, 229 So. 2d 855 (Fla. 1969) (videotaped confession of defendant admissible in criminal trial).

2. *Id.* at 859.

3. See Note, *Video Tape: It's Admissibility in Evidence and Other Uses*, 5 GA. ST. B.J. 393, 402-03, 408-09 (1969), for a discussion of Florida's pioneering role in various uses of videotape.

4. *Id.* at 408. A plea of manslaughter was accepted by the judge after viewing a videotape of the defendant's session with a psychiatrist.

5. McCrystal, *Video Tape Trials*, 44 OHIO B. 639 (1971); McCrystal, *Ohio's First Video Tape Trial: The Judge's Critique*, 45 OHIO B. 1 (1972); McCrystal & Young, *Pre-recorded Videotape Trials - An Ohio Innovation*, 39 BROOKLYN L. REV. 560 (1973); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. L.J. 463 (1973); McCrystal, *The Videotape Trial Comes of Age*, 57 JUDICATURE 446 (1974); McCrystal & Kornblum, *The Prerecorded Videotape Trial: A Status Report*, 25 FED'N INS. COUNSEL 121 (1975); McCrystal, *The Case for PRVTT's*, 12 TRIAL 56 (July 1976); McCrystal, *Videotaped Trials: A Primer*, 61 JUDICATURE 250 (1978); McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 TOL. L. REV. 239 (1980).

tion hearings, and even surgical procedures.⁶ Completely videotaped testimony⁷ in civil trials has been optionally employed in Erie County⁸ courts for the past six years.⁹ The result has been a reduction in pending cases; and although filings have increased, there has been no concomitant increase in court facilities or personnel.¹⁰ Thus PRVTT's have helped to ease burdens on the judiciary, while preserving a jury trial for the litigants.¹¹

Opponents of videotape voice concern over its effect on jurors, fearing that trials will become confused with entertainment and that valuable elements of the judicial process will become distorted in an overprocessed one-eyed view of courtroom interactions.¹² Additionally, videotape in criminal trials raises numerous constitutional problems pertaining to self-incrimination, the right to confront one's accusers, to have assistance in one's defense, and the right to a public trial.¹³

This survey will discuss the scope, present use, and possible future adaptations of videotape in the legal system; and will distinguish fact from fiction in evaluating the strengths and weaknesses of videotape in the judicial system.

THE MECHANICS OF VIDEOTAPE EVIDENCE

Many courts simply lump videotape together with pictures and motion pictures.¹⁴ Scott¹⁵ clearly distinguishes videotape from movie

6. McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 TOL. L. REV. 239, 246 n.15 (1980).

7. Such trials are generally referred to as PRVTT's (pre-recorded video tape trials). See text accompanying notes 87-100 *infra*.

8. Erie County is the twelfth largest in Ohio for personal injury litigation, sixteenth largest for total civil litigation. McCrystal, *The Case for PRVTT's*, 12 TRIAL 56 (July 1976).

9. McCrystal & Maschari, *supra* note 6, at 253.

10. *Id.* at 246 n.15.

11. Morrill, *Enter - The Video Tape Trial*, 3 J. MAR. PRACT. & PROC. 237, 238 (1970).

12. Peters & Wilkes, *Videotaping of Surgery for Use as Demonstrative Evidence in Medical Malpractice Litigation*, 16 DUQ. L. REV. 359, 367 (1977-78).

13. See text accompanying notes 52 to 72 *infra*.

14. See Morrill, *supra* note 11, at 253-54 n.24, 254 n.27, 255-56 n.32 (1970); C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1294 n.18.5 (2d ed. Supp. 1980); Annot., 60 A.L.R.3d 333 (1974).

film: on videotape "there are no individual pictures or frames, the image and the sound are both recorded in the form of electronic impulses on a magnetic tape. Like a sound tape recording these videotapes require no processing and can be played back immediately."¹⁶

Videotape is recorded with a video camera connected to a video recorder. This equipment is commonplace and is now sold for home use as a more expensive alternative to home movie cameras.¹⁷ Playback is accomplished by using a player and a video screen (a television). Tapes can be in color, or black and white, and a time/date generator can be used to record a readout on the film which is useful in locating specific portions on the film.¹⁸ The tape cannot be edited easily by splicing, thus making it an excellent vehicle for evidence. Objectionable material can be removed, if necessary, by blanking out the sound on a copy, blanking out pictures and sound on a copy, or re-recording only the acceptable parts of the material. The original tape can be preserved as a full record.¹⁹

While videotape equipment is still relatively costly, it is now readily available to the legal community. Court reporters often use the equipment, or have sufficient information to direct an attorney to local facilities where taping can be performed. Current taping costs range from \$90-\$250/hour²⁰ including technician time and purchase of the tape. Playback charges are \$50-\$75/hour, but playback equipment is inexpensive enough to purchase if desired. While in the early days of videotape use, stringent requirements were adopted by some courts regarding the type of equipment that could be used,²¹ today the test is whether the tape gives an accurate representation of what had actually

15. C. SCOTT, *PHOTOGRAPHIC EVIDENCE* (2d ed. 1969).

16. *Id.* § 714. However, he concludes that as long as the tape presents a verifiably fair representation of its subject it can be admitted into evidence on the same basis as movie film. *Id.* at § 1294.

17. *CONSUMER REP.*, Nov. 1980, at 690.

18. 23 *AM. JUR. Trials* § 171 (1976).

19. McCrystal, *Videotaped Trials: A Primer*, 61 *JUDICATURE* 250, 252-53 (1978).

20. Dickerson, *Video-taped Wills Offer Deceased the Last Word*, *Miami Herald*, Nov. 12, 1980, § EP (Magazine), at 3, col. 3.

21. *Kallen v. Nexus Corp.*, 54 F.R.D. 610, 614-15 (N.D. Ill. 1972) (required that sound recording be done with individual lavalier microphones, backup recorder, and provision to make all copies simultaneously).

occured.²² In criminal investigations, such as undercover surveillance or automatic monitors in banks and stores, tapes may be of poor quality. When the tape has both video and audio tracks, one can be used without the other if one is of unacceptable quality.²³

Deposition tapes should be taken with an eye toward possible use at trial. An uncluttered desk is a possible setting²⁴ for the deposition, as is an actual courtroom.²⁵ Several cameras may be used for the witnesses, attorneys, and for an overall view. It is possible to project all images at once to the viewer, using a split screen technique.²⁶ Special lighting is unnecessary, but it has been reported that a black and white tape of a black witness in a poorly lighted situation may lose some of the facial expression present.²⁷

USES OF VIDEOTAPE IN CIVIL PRACTICE

In 1970 the Federal Rules of Civil Procedure were amended²⁸ to include depositions by videotape on motion of a party²⁹ to the litigation.

22. 229 So. 2d at 859.

23. *Williams v. State*, ___ Ind. ___, 383 N.E.2d 444 (1978) (clear picture with partially inaudible sound has probative value). *People v. Fenelon*, 14 Ill. App. 3d 622, 303 N.E.2d 38 (1973) (video portion of D.W.I. tape admissible without sound portion).

24. *Miller, Videotaping the Oral Deposition*, 18 PRAC. LAW. 45 (1972).

25. *Merlo and Sorenson, Video Tape: The Coming Courtroom Tool*, 7 TRIAL 55, 57 (Nov. 1971) (suggesting a flag in the background for a more formal effect).

26. See text accompanying notes 128-43 *infra*.

27. *Bermant, Chappel, Crockett, Jacobovitch & McQuire, Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975, 984 (1975).

28. See *United States Steel Corp. v. United States*, 43 F.R.D. 447 (S.D. N.Y. 1968) (urging adoption of the proposed rule). See generally *Kennelly, The Practical Uses of Trialvision and Deposition*, 16 TRIAL LAW GUIDE 183, 201-05 (1972); Note, *Videotape Depositions: An Analysis of Use in Civil Cases*, 9 CUM. L. REV. 195, 204-10 (1978).

29. FED. R. CIV. P. 30(b)(4):

The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

These motions are now routinely granted, overcoming the early confusion surrounding the guidelines for granting them.³⁰ The court's order may include provisions for signing or authenticating the tape, mechanical specifications, operator qualifications, storage, filing and duplication requirements.³¹ Presently, the use of depositions at trial is limited to impeachment,³² or circumstances where a witness is unavailable,³³ or under extraordinary circumstances.³⁴ Videotaped demonstrations may be admitted as photographs³⁵ in federal courts.

In Florida, videotaped depositions are permitted by court order under Rule 1.310 (b)(4).³⁶ They may be used at trial pursuant to Rule 1.330,³⁷ based on its federal rule counterpart, but allowing routine use when the witness is an expert or skilled witness.³⁸

Depositions can be taken for two different purposes. When used simply for discovery, the scope of inquiry can be broad, even permitting inadmissible matter to be discovered if its use is calculated to lead to the discovery of admissible material.³⁹ Videotaped depositions can be valuable in situations where movement contributed to or caused the injury⁴⁰ which is the subject matter of the pending suit.

30. *Proposed Amendments to Civil Rules*, 43 F.R.D. 211, 239-40 (1967). The Advisory Committee Notes state "in order to facilitate less expensive procedures." This prompted one court to refuse a motion for a videotaped deposition unless such cost savings were shown. *Perry v. Mohawk Rubber Co.*, 63 F.R.D. 603 (D.S.C. 1974).

31. FED. R. CIV. P. 30(b)(4).

32. FED. R. CIV. P. 32(a)(1).

33. FED. R. CIV. P. 32(a)(3)(A)-(D).

34. FED. R. CIV. P. 32(a)(3)(E) requires "that such exceptional circumstances exist as to make it desirable . . . to allow the deposition to be used."

35. FED. R. EVID. 1001(2).

36. FLA. R. CIV. P. 1.310 (b)(4):

Upon motion, the court shall, subject to the provisions of Rule 1.280(c) and the guidelines provided by Fla. R. Jud. Admin. 2.070(d), order that the testimony at a deposition be recorded on videotape and may order that the testimony at a deposition be recorded by other than stenographic means at the initial cost of the movant. A party may also arrange for a stenographic transcription at his own initial expense.

37. FLA. R. CIV. P. 1.330.

38. FLA. R. CIV. P. 1.330(a)(3).

39. FED. R. CIV. P. 26(b). FLA. R. CIV. P. 1.280(b).

40. *Brown v. Briggess*, 327 So. 2d 874, 875-76 (Fla. 1976) (defendant instructor was ordered to participate in a videotaped exhibition of karate maneuvers with an ex-

Depositions may also be taken expressly for trial presentation. Videotaped depositions of geographically distant experts for use as trial testimony can help expand the range of an attorney's presentation. It may conceivably be much cheaper for attorneys to travel to the expert's locale and tape his testimony at local facilities rather than bring him to the trial. Scheduling is simplified, performed at the convenience of the participants without reference to docket openings. Also the impact of charts and graphs used by the expert can be significantly enhanced by the use of zoom lenses.⁴¹

As insurance against the possibility of a witness' unavailability at a later date, fresh testimony of the witness can be preserved on videotape for use at trials held years later.⁴²

Demonstrations are an excellent area for the use of videotapes. Line of sight at an accident, the operation of a piece of machinery, product failure under stress, and other experiments are considerably more impressive on videotape than in photos or verbal descriptions.⁴³ Evidence of the appearance of the injured party shortly after the accident can also be preserved for later use at trial.

Judge McCrystal envisions videotape for recording the "execution of wills, contracts and other legal documents,"⁴⁴ to preserve the intent, competence and volition of the parties.⁴⁵ Videotaped execution of wills is currently available in Florida.⁴⁶ However, under the Florida Probate

planation of his teaching techniques).

41. Note, *Videotape Depositions: An Analysis of Use in Civil Cases*, 9 CUMB. L. REV. 195, 199 (1978). See generally Annot., 66 A.L.R.3d 637 (1975).

42. See 23 AM. JUR. *Trials* § 109-10 (1976); Kennelly, *supra* note 28, at 186-95.

43. In one striking case, *Zollman v. Symington*, 438 F.2d 28 (7th Cir. 1971), a car fell from a garage hoist. Taped experiments made by the defendant hoist manufacturer showed that the car would fall only if improperly positioned on the hoist. These tapes were shown to the jury. At trial plaintiff claimed that the hoist had spontaneously shifted, a defect that could have been cured by a simple design modification. That evening the defense modified the hoist and taped new tests. The results were unchanged. Since the tape needed no processing, it was ready for use at trial the next morning. On appeal, the court ruled that the laws of science demonstrated on defendant's tapes, challenged only by plaintiff's unsupported claims, left no question of fact for the jury on that matter. *Id.* at 31. See Stewart, *Videotape: Use in Demonstrative Evidence*, 21 DEF. L.J. 253 (1972).

44. McCrystal & Maschari, *supra* note 6, at 249.

45. *Id.*

46. Dickerson, *supra* note 20, at 3, col. 3.

Code, a will must be in writing⁴⁷ and executed by the correctly performed signatures of the testator and witnesses.⁴⁸ Any taping is purely optional and has no legal effect on the will's validity. While taping may preserve a record of the mental state and intent of the testator, it would only be admissible as evidence in rare circumstances under the statute. Nevertheless it does personalize an event that the law has served to depersonalize.⁴⁹

It has even been suggested that all surgical procedures be videotaped,⁵⁰ making frivolous malpractice claims easier to detect; and possibly providing useful evidence in the event of actual malpractice.⁵¹

USES OF VIDEOTAPE IN CRIMINAL PRACTICE

Generally, material that would be admissible in writing or photographic form is admissible in videotape form.⁵² However, special problems bear further consideration. A defendant has the right to have an attorney aid in his defense.⁵³ Thus, a videotaped booking cannot be used for identification of the suspect by the victim if the suspect had not had counsel available at the booking. The use of tapes in such a matter constitutes a lineup thereby requiring counsel to be present.⁵⁴ Tapes have been used for confessions, booking, interrogations, surveillance, and to record a defendant's presence or behavior at the scene of the alleged crime. After viewing these tapes, many defendants do not contest the charges against them and plead guilty.⁵⁵

It has been asserted that the use of videotape infringes on a defen-

47. FLA. STAT. § 732.502 (1976).

48. FLA. STAT. § 732.502(1) (Supp. 1980).

49. "A lot of people just want to sound off." Dickerson, *supra* note 20, at 3, col. 4.

50. Peters & Wilkes, *supra* note 12.

51. *Id.* at 361-62.

52. 229 So. 2d at 859. State v. Lusk, 452 S.W.2d 219 (Mo. 1970).

53. Hutchins v. State, 286 So. 2d 244, 246 (Fla. 3d Dist. Ct. App. 1973).

54. Cox v. State, 219 So. 2d 762 (Fla. 1969).

55. Comment, *Judicial Administration-Technological Advances-Use of Videotape in the Courtroom and the Stationhouse*, 20 DE PAUL L. REV. 924, 947 (1971). See generally Short, Florence, & Marsh, *An Assessment of Videotape in the Criminal Courts*, 1975 B.Y.U. L. REV. 423, 430-37 (1975) (uses, precautions, and appropriate equipment).

dant's right against self incrimination.⁵⁶ While the courts have admitted videotapes of the defendant under the same restrictions that apply to use of his oral statements, which can be read or testified to, it has been suggested that the defendant may not be aware of the breadth of his videotaped admission. The defendant's demeanor and appearance may work against him in a manner that no written transcript could.⁵⁷ Harsh lighting can exaggerate facial irregularities or scars.⁵⁸ In fact, a videotaped confession may be the functional equivalent of "requiring the defendant to take the stand and testify against himself."⁵⁹

Notwithstanding, videotape may offer *more* protection to a suspect. Jurors can see the actual event, not the prosecution's retelling of it. For example, videotape may show how a confession was obtained.⁶⁰ In one case a defendant used a videotape of his session with a psychiatrist to convince a judge of his diminished capacity, thus permitting him to plead guilty to a lesser charge of manslaughter.⁶¹ The psychiatrist stated that his testimony was simplified by having the judge view the taped session.⁶²

The use of videotaped witness testimony presents special constitutional problems,⁶³ particularly in light of the constitutional requirement that a criminal defendant has the right to confront any witnesses against him.⁶⁴ Previously the courts had vacillated in deciding whether this confrontation must occur before the jury; the decisions now hold that it need not be.⁶⁵ The defendant may demand to be present at any

56. U.S. CONST. amend. V, cl. 8 provides in pertinent part: "nor shall be compelled in any criminal case to be a witness against himself. . . ."

57. *Hendricks v. Swenson*, 456 F.2d 503 (8th Cir. 1972) (Heaney, J., dissenting).

58. *Id.* at 509.

59. *Id.*

60. *McCrystal & Maschari*, *supra* note 6, at 248.

61. Note, *Video Tape: It's Admissibility in Evidence and Other Uses*, 5 GA. ST. B.J. 393 (1969) (discusses the plea).

62. *Id.* at 408.

63. See Cunningham, *Videotape Evidence: Technological Innovation in the Trial Process*, 36 ALA. LAW. 228, 342-46 (1975); Short, Florence & Marsh, *supra* note 55, at 454-56.

64. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

65. U.S. CONST. amend. VI. *Pointer v. Texas*, 380 U.S. 400 (1965).

deposition that will be used at trial in lieu of live testimony,⁶⁶ and any videotaped depositions taken without the intent to use them instead of live testimony at trial cannot be used.⁶⁷ One court has held that the use of videotape does not filter the testimony so as to deprive the criminal defendant of due process.⁶⁸

As long as the rights of the defendant are protected, videotape can be an extremely important tool in criminal trial work.⁶⁹ It could be used for example, to preserve the testimony of witnesses who might be unavailable at trial, including experts, officers with conflicting subpoenas and speedy trial deadlines to meet, laboratory personnel, or hospitalized victims. An application that might have particular use in Florida involves the testimony of aliens subject to deportation, who are potential witnesses in cases involving the smuggling of drugs or illegal aliens.⁷⁰ If the government can detain and even incarcerate those aliens it wishes to use as potential witnesses and deport all others who may have witnessed the same acts, the rights of the defendant are violated.⁷¹ To avoid the necessity of keeping all potential witnesses available until the trial date, videotaped depositions made expressly for use at trial may be an excellent alternative.⁷²

VIDEOTAPE TO PRESERVE THE RECORD IN CIVIL OR CRIMINAL TRIALS

Alaska, faced with a shortage of court reporters, uses videotape for

66. FED. R. CRIM. P. 15(a); FLA. R. CRIM. P. 3.190(j).

67. *State v. Basiliere*, 353 So. 2d 820, 825 (Fla. 1977). But a taped deposition of the victim in the hospital is not too potent to show the jury (rather than reading the written transcript). *State v. Jackson*, 259 N.W.2d 796 (Iowa 1977).

68. *People v. Moran*, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (Ct. App. 1974). See text accompanying notes 128-43 *infra*.

69. See generally Barber & Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L.J. 1017 (1974).

70. See Note, *Videotape Depositions: An Alternative to the Incarceration of Alien Material Witnesses*, 5 CAL. W. INT'L L.J. 376 (1975).

71. *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971).

72. The defendant's right to a public trial (U.S. CONST. amend. VI) includes a corollary right of the public to attend the trials. Extensive use of taped testimony may violate this right if provision is not made for public access to the depositions. This may be difficult to effectuate. Cunningham, *supra* note 63, at 246.

trial transcripts.⁷³ Videotape has an advantage over voice recordings since it is easy to see who said what.⁷⁴ The behavior of trial participants that might constitute reversible error may not be sufficiently preserved on stenographic transcripts for an appellate court to rule on it.⁷⁵ Nevertheless, by allowing appellate judges to see the witnesses as the jury saw them, the nature of the appellate process might be significantly changed.⁷⁶ Most appeals should be decided on questions of law, without reviewing the jury's decision on the credibility of the witnesses.⁷⁷

Appellate judges seem to prefer written transcripts to compare different parts of the record.⁷⁸ For example, appellate judges reviewing Judge McCrystal's videotaped trials requested written transcripts.⁷⁹ Transcription of the audio part of the tape is much slower than transcription of stenographic notes.⁸⁰ An eighteen month experiment with videotape transcripts with no written transcripts was discarded when judges found that it actually slowed down the appeal process.⁸¹

Since Florida presently allows cameras in courtrooms,⁸² videotapes can be used to preserve court records with no legal barriers. A rape trial, where the victim is deaf, retarded and suffering from cerebral palsy has been videotaped so that the victim's testimony, through gesture and sign language to an interpreter, can be fully preserved "in case there's an appeal."⁸³

73. Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A. J. 457, 457 (1969).

74. *Id.* at 458.

75. *Shelley v. Clark*, 267 Ala. 621, 103 So. 2d 743, 747 (1958) (attorney's shaking finger in face of witness not noted in trial record, therefore not grounds for appeal. *See generally* Morrill, *supra* note 11, at 240 n.3.

76. Cunningham, *supra* note 63, at 239.

77. *Id.*

78. Kosky, *Videotape in Ohio*, 59 JUDICATURE 230, 233 (1975). Mr. Kosky was past president of the National Shorthand Reporters Association. *Id.* at 238.

79. *Id.* *See* text accompanying notes 87-100 *infra* for a description of these trials.

80. *Id.* at 233. Transcription of tapes yields 20-25 pages per day; transcription of stenonotes yields 80-120 pages per day.

81. Burt, *The Case Against Courtroom TV*, 12 TRIAL 62, 63 (July 1976). All the cases were from a county criminal court in Tennessee.

82. *Petition of Post Newsweek Stations, Fla., Inc.*, 370 So. 2d 764 (Fla. 1979).

83. *Miami Herald*, Oct. 26, 1980, § BR, at 19, col. 2.

TECHNIQUES FLORIDA COURTS DO NOT USE

Proponents of videotape in trial settings have long championed the option of litigating trials wherein all of the testimony is videotaped.⁸⁴ PRVTT's are seen as an answer to reducing overcrowded dockets and long delays for trial dates.⁸⁵ For comparison purposes, Judge McCrystal compared a hypothetical simple personal injury case tried in the traditional manner with a PRVTT trial.⁸⁶ The study reveals the major changes in the trial process.

Testimony is taken from all parties and witnesses at their convenience.⁸⁷ The completed tapes are given to the judge together with a list of objections keyed to their location on the tape.⁸⁸ The objections can be ruled on at the convenience of the judge, and can often be done quickly.⁸⁹ Complicated rulings can be made after careful evaluation, thereby reducing the chances of reversal on appeal.⁹⁰ However, since all objections must be made in writing, an additional burden may be cast upon the attorneys.⁹¹ If the case is proper for a directed verdict, no jury need be impaneled.⁹² The edited tape might form the foundation for a settlement based on a "realistic evaluation of an accurate picture of the trial."⁹³ The editing date would be the effective date of settlement, and would shorten the length of the case.⁹⁴ If the case does proceed to trial, the attorneys select a jury, then give opening statements

84. See note 5 *supra*.

85. McCrystal & Maschari, *supra* note 6, at 246. With an increase of 33% in filings, the number of pending cases was reduced 31%. Brennan, *Videotape-The Michigan Experience*, 24 HASTINGS L.J. 1, 5 (1972). A three-day trial yielded one day of admissible material after deletion of inadmissible material, conferences and motions.

86. McCrystal & Maschari, *supra* note 6, at 241-46.

87. *Id.* at 242.

88. *Id.*

89. McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. L.J. 463, 469 (1973). Fifteen minutes were needed to rule on all of the motions submitted at the first videotape trial that J. McCrystal did.

90. Morrill, *supra* note 11, at 242.

91. Salvan, *Videotape for the Legal Community*, 59 JUDICATURE 222, 236 (1975).

92. Note, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J.L. & SOC. PROB. 363 (1973).

93. Morrill, *supra* note 11, at 247.

94. McCrystal, *Videotaped Trials: A Primer*, *supra* note 19, at 254.

based on what the evidence accurately reflects, not on what they hope it will show.⁹⁵ The jury then views the edited tape. The jury can be left alone to view the trial with a tape viewer and a bailiff, saving the presiding judge's time;⁹⁶ alternatively, the judge, attorneys and parties could remain with the jury.⁹⁷ The possibility of mistrial from misconduct is significantly lessened in either case.⁹⁸ The attorneys then give their summation; the judge charges the jury; and deliberation begins. Appeals can be made based on the trial tape and unedited tape.⁹⁹ If retrial is necessary, the same tape, edited in compliance with the appellate court's ruling could be used.¹⁰⁰ This would prevent a change in tactics on retrial, not necessarily a beneficial result. If the new edition of the tape is acceptable for retrial, the saving of time and money would be significant.

Opponents of PRVTT's note that depositions are not the proper place for impeaching witnesses, and that two encounters with each witness or party would still be necessary,¹⁰¹ thus rendering some of the time savings illusory. Since objections are not ruled on immediately, attorneys may pursue long lines of inadmissible material when making the trial tape.¹⁰² Alternate approaches to information may have to be taped, a tedious and frustrating situation.¹⁰³ Additionally, videotape is not ideal for use in complicated trials, although simple personal injury cases have proven amenable to PRVTT.¹⁰⁴ While some attorneys fear

95. McCrystal, *Videotape Trials: Relief for Our Congested Courts*, *supra* note 89, at 476.

96. *Id.* at 473.

97. Bermant, Chappell, Crockett, Jacobovitch & McGuire, *supra* note 27, at 986.

98. Note, *Videotape Trials: Legal and Practical Implications*, *supra* note 92, at 363.

99. McCrystal & Maschari, *supra* note 6, at 239.

100. *Id.* FLA. EVID. CODE § 90.803 (22) already provides that in retrial of a civil case, the former testimony of a witness given at the original trial can be used as evidence at the retrial, regardless of whether the witness is available. "Thus, in a retrial of a case it is unnecessary to call as a witness a person who testified during the first trial." FLA. STAT. § 90.803, Sponsor's note (22) (1979).

101. Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9, 29 (1972).

102. Hartman, *Second Thoughts on Videotaped Trials*, 61 JUDICATURE 256, 257 (1978).

103. *Id.*

104. McCrystal & Maschari, *supra* note 6, at 246.

that television is regarded as "entertainment" in the public's mind,¹⁰⁵ the increased business uses of computer display terminals may be changing that image.¹⁰⁶

The use of PRVTT's in Ohio came after the Ohio Supreme Court changed that state's rules of civil procedure.¹⁰⁷ It is the function of the judges and attorneys to adapt the legal processes necessary to meet the needs of the people.¹⁰⁸ If valid results can be obtained with the increased use of technology, the increased efficiency may provide an alternative to further expansion of the courts. Nevertheless, there is a need to be sure that a "canned"¹⁰⁹ trial produces valid results. This is an area which, although presently filled with conjecture, is nonetheless yielding to scientific study.

THE EFFECT OF VIDEOTAPE EVIDENCE ON THE TRIAL PROCESS

Some attorneys feel that a trial solely using taped testimony would be sterile, interfering with the traditional interaction between attorney, jury and witnesses. Their carefully calculated courtroom presence may lose its effectiveness on videotape,¹¹⁰ especially if the camera focuses on

105. Doret, *Trial by Videotape - Can Justice Be Seen to Be Done?* 47 TEMP. L.Q. 228, 249 (1974).

106. *Id.*

Also, a medium which has brought us such events as the funeral of assassinated President John F. Kennedy, the landing of the first man to reach the moon, and the Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities cannot be altogether without serious content.

Petition of Post Newsweek Stations, Fla., Inc., 370 So.2d 764, 776 (Fla. 1979).

107. See McCrystal, *supra* note 89, at 478-82.

108. Courts are the only branch of the government operated by a single profession. McCrystal & Maschari, *supra* note 6, at 239. The court has the power to change its own rules. Morrill, *supra* note 11, at n.14.

109. Brennan, *supra* note 85, at 5.

110. Note, *Videotape Trials: Legal and Practical Implications*, *supra* note 92, at 390 (citing an address by Judge McCrystal at the 1972 Sixth Circuit Judicial Conference, Cincinnati, Ohio, May 18, 1972:

[T]he first thing that occurs to the trial lawyer is, "This takes me right out of the trial and my good looks, and my gray hair, and my new suit, and my theatrical skills and dramatic abilities are all gone." Well, gentlemen, the an-

the witness and not the attorney. Nevertheless, it is the jury's function to consider the testimony of the witnesses, not the charm of the attorney, and the "live parts" of the trial still present a sufficient opportunity for personal interaction. Attorneys may be against PRVTT's until they actually try one.¹¹¹

Useful data about attorney response to PRVTT's is sketchy. Judge McCrystal notes that only 25% of those cases automatically set for PRVTT'S based on the nature of the case are removed from the taped docket by the parties.¹¹² This would seem to indicate satisfaction with PRVTT'S by those who use them regularly.

A massive survey of attorney's attitudes regarding the use of PRVTT'S has been conducted.¹¹³ Various factors which distinguish PRVTT'S from traditional trials were rated as desirable, neutral or undesirable. A few of the factors were worded in less than neutral terms, actually amounting to unsupported conclusions.¹¹⁴ The results showed that attorneys generally approved of the time and money savings that could be realized by the appropriate use of PRVTT's,¹¹⁵ and of the protection PRVTT's provide for the jury by excluding inadmissible material and reducing long trial delays,¹¹⁶ and of the degree of pretrial control attorneys had over their trial presentation.¹¹⁷ Attorneys were unhappy however, over any proceeding done without a judge present to aid the jury¹¹⁸ and were generally negative concerning the jury's reac-

swer is, "Yes," but not your legal skills. Try as I will . . . I have never found under the definition of "due process" a subtitle "dramatic skills" and I don't think it is a part of our due process system.

111. McCrystal, *Videotaped Trials: A Primer*, *supra* note 94, at 254 (noted this effect).

112. McCrystal & Maschari, *supra* note 6, at 246 n.14.

113. Comment, *Opening Pandora's Box: Asking Judges and Attorneys to React to the Videotape Trial*, 1975 B.Y.U. L. REV. 487 (1975). Eight hundred members of the Defense Research Institute and eight hundred members of the Association of Trial Lawyers of America were polled. About one third of those polled had used videotapes in some aspect of trial work. *Id.* at 517.

114. *Id.* at 505. For example, "Jurors enjoy a taped trial less than a live one." *Id.*

115. *Id.* at 495.

116. *Id.* at 503.

117. *Id.* at 499.

118. *Id.* at 503.

tion to PRVTT's.¹¹⁹

The judges surveyed in the same study were generally more favorable to all the factors present in PRVTT's except for their inability to question the witnesses.¹²⁰ They did not feel as strongly as the attorneys that their own presence was as necessary during the viewing of the tape.¹²¹

Witnesses in Ohio's first PRVTT¹²² claimed to be less nervous in front of the camera than they would have been in court.¹²³ An attorney noted the same effect in a San Francisco PRVTT.¹²⁴ A large scale in-court taping of witness testimony at preliminary hearings showed no difference in stress between courtroom appearances untaped or taped.¹²⁵ If only some of the testimony is pretaped, the witnesses most likely to be taped are those who already spend a significant amount of time in court, people whose testimony would be little affected by the change in procedure. For witnesses unaccustomed to the courtroom, a quiet room with the parties, attorneys and technician is less distracting than a public room with strangers coming and going.¹²⁶ Reliability of testimony remains basically unchanged.¹²⁷

Jury reaction is the main concern of the trial lawyers surveyed.¹²⁸ There is now available data that should allay their worst fears and show that the use of videotape may not be such a radical departure from traditional jury trials as once was feared.

119. *Id.* at 507. This was the area where the factors became less objectively worded. Plaintiff's attorneys were less negative about jury response.

120. *Id.* at 499. Judges find videotape better for depositions presented at live trial than the reading of transcripts. Jurors are instructed to evaluate the demeanor and frankness of the witness—an impossibility using readings of written transcripts.

121. *Id.*

122. *McCall v. Clemens*, Civil No. 39301 (C. P. Erie County, Ohio, Dec. 6, 1971.).

123. *Watts, Comments on a Video Tape Trial*, 45 OHIO B. 51, 55 (1972).

124. *Bermant, Chappell, Crockett, Jacoubovitch & McGuire*, *supra* note 27, at 987.

125. *Short, Florence & Marsh*, *supra* note 55, at 447. "[S]eventy three percent of the attorneys sampled *agreed* with the statement, 'witnesses behave the same whether they are being videotaped or not.'" (footnote omitted).

126. *Morrill*, *supra* note 11, at 246. *Doret*, *supra* note 105, at 246.

127. *Short, Florence & Marsh*, *supra* note 55, at 443.

128. *See* text accompanying note 119 *supra*.

Judge McCrystal notes that an independent survey of 250 jurors who participated in 45 PRVTT's showed that 75% of the respondents would actually *prefer* a videotaped trial if they were a party in a similar civil suit¹²⁹ (simple personal injury action). The jurors in the San Francisco PRVTT¹³⁰ generally felt that the conduct of the trial and the presentation of the case were satisfactory and gave them sufficient information to decide the case.¹³¹

Jurors from both of the above surveys were asked if they would choose a videotape trial if they were a criminal defendant. Sixty-five percent of the jurors over 40 years of age answered affirmatively, as did 26% of those under 40,¹³² leading to the possibility that the "video generation" is more skeptical of videotape.¹³³

The most exhaustive research of juror response to videotape has been carried out in Michigan.¹³⁴ Surveys of large numbers of actual jurors, in what they perceived as actual trials, showed few significant differences in how trial evidence and participants in the trial were perceived by the jurors. A live presentation was compared to the same presentation videotaped and replayed in color or black and white, with one camera, and on split screen three camera presentations. Black and white seemed to yield greatest retention of fact, color next, and live the least.¹³⁵ As the length of the presentation increased, fact retention improved with videotaped presentation.¹³⁶ A test of the effect of deleting inadmissible material showed no appreciable difference between retaining and deleting it,¹³⁷ whether the material was deleted by clean edit-

129. McCrystal, *The Case for PRVTT's*, *supra* note 8, at 57.

130. *Liggon v. Hanisko*, Civil No. 637-707 (Super. Ct. San Francisco County, Cal., Sept. 19, 1973).

131. Bermant, Chappell, Crockett, Jacoubovitch & McGuire, *supra* note 27, at 985. The judge, attorneys and parties remained with the jury during viewing of the tape.

132. *Id.* at 993.

133. *Id.*

134. Miller, Fontes & Dahnke, *Using Videotape in the Courtroom: A Four-Year Test Pattern*, 55 J. URB. L. 655 (1978).

135. *Id.* at 680. But this must be traded off against the loss of perception of flushed faces; these are more perceptible in color presentation. Hartman, *supra* note 102, at 257.

136. Miller, Fontes & Dahnke, *supra* note 134, at 655.

137. *Id.* at 671.

ing using retaping, blacking out only sound, or blacking out sound and picture, although the latter was considered more distracting.¹³⁸

In another series of experiments, the same researchers found that the ability of a subject to detect lies told by strangers remained unaffected by different modes of communication (live, videotape, written transcript or audio tape) even where the subjects were forewarned that lies would be told.¹³⁹ In fact, in all modes, detection of lies was poor.¹⁴⁰

While results of jury perception surveys dealing with large numbers of jurors show little difference between traditional and PRVTT trials,¹⁴¹ evaluation of a trial where only the opposing experts were presented either live or taped showed differences in juror response based on the mode of presentation.¹⁴² One witness was more effective for the client he was testifying for live, one taped. Full length shots were preferred over close-ups in this survey.¹⁴³

CONCLUSION

Videotape is not the salvation of an overburdened legal system, but it is a useful tool that lawyers should not be afraid to use under the proper circumstances. Early fears regarding the undesirable effects of videotaped testimony have been greatly allayed by sound research in the field. It is the responsibility of the legal profession to best use the tools available to it to serve the needs of the people. "The legal profession did not stop using scribes until 300 years after the Gutenberg flatbed press had been developed. . . . (I)t is hoped that the time be-

138. *Id.* at 677. Other jurors have noted that courtroom noises may be amplified to an annoying degree (paper rustling). Murray, *Use of Videotape in the Preparation and Trial of Lawsuits*, 11 FORUM 1152, 1158 (1976).

139. Miller, Fontes & Dahnke, *supra* note 134, at 693. The speakers were also put under stress to approximate a witness situation. Audio tape was the least effective mode for detection of lies.

140. *Id.*

141. See Bermant, *Critique-Data in Search of Theory in Search of Policy*, 1975 B.Y.U. L. REV. 467 (1975), for a critique of the surveys of Michigan and Ohio subjects; Bermant & Jacovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns About Videotaped Trials*, 26 HASTINGS L.J. 999 (1975).

142. Miller, Fontes & Dahnke, *supra* note 134, at 668.

143. *Id.* at 695.

tween availability and use [of videotape] will be somewhat less than in the earlier case.”¹⁴⁴

Rita Dee

144. Salvan, *supra* note 91, at 229.